Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of IP-Enabled Services	WC Docket No. 04-36

COMMENTS ON NOTICE OF PROPOSED RULEMAKING BY VERMONT PUBLIC SERVICE BOARD

INTRODUCTION AND SUMMARY

The Vermont Public Service Board[1] hereby respectfully submits initial comments on the questions raised in the Commissions Notice of Proposed Rulemaking (FCC 04-28) released on March 10, 2004.

Regulation of IP-Enabled services should be based on their function, not the technology used to deliver the service. Regulation should avoid "stovepipe" or "silo" classifications based on particular technologies. Rather, regulation should be based on the function provided to the customer. A layered approach to regulation can be consistent with this functional approach.

The commission should acknowledge the need for continued government regulation, including state regulation, of IP-Enabled services. This regulation is needed to protect three groups of interests. First, government should protect a variety of customer interests, including the control of ones own communications, consumer protection and privacy. Second, government should protect the interests of other carriers,

[1] The Vermont Public Service Board is a "State commission" within the meaning of the Communications Act. *See, e.g.,* 47 U.S.C. § 101(a), §§ 251(e), 252(b).

such as the interest in having honest dealings. Third, government should protect the interests of the people generally, such as those expressed in existing emergency service programs and in number conservation. Finally, IP-Enabled services should not be allowed to exercise market power, to the detriment of either their wholesale or retail customers.

"Title I" regulation is unlikely to be a sufficient legal basis for proper regulation of IP-Enabled services. A service is more than an "information service" if it includes paid data transport between third parties, and the Commission cannot overlook this transport element. Title I regulation is not demonstrably sufficient to protect the public, largely because the Act is virtually silent on the Commission's authority under Title I "ancillary regulation." As a result, a declaration that IP-Enabled service is an information service would put many of the benefits of Title II regulation at risk. Declaring IP-Enabled services to be an information service will complicate separations and universal service, and should be referred to the Joint Boards. Also, declaring IP-Enabled services to be an information service is likely to weaken the abilities of the states to protect their citizens.

Preemption of state regulation is not justified. First, state regulation is not inherently harmful, and "divergence" of state policies regarding IP-Enabled service is consistent with federalism. More important, the commission has no authority to preempt state regulation of an information service, because its authority is limited to communications. Preemption is not suggested or required by the Act, which speaks only narrowly about regulation of the Internet. Preempting state authority over IP-Enabled service will deprive Vermont of authority it needs to protect the legitimate interests of its

consumers, its existing efforts to enforce carrier-to-carrier standards, and the public interests in such programs as Enhanced 911 and conservation of the 802 area code.

Rather than expand the definition of "information service," the commission should keep a broad definition of "telecommunications service." To achieve a light regulatory touch for IP-Enabled service, the Commission should use its statutory forbearance power, as needed. To prevent states from creating unreasonable barriers for IP-Enabled service providers, the Commission should rely on Section 253.

Legislation is needed to make the Communications Act work with modern networks. The Vermont Public Service Board would be pleased to work cooperatively with the Commission in designing new legislation that meets the realities of current markets and technologies.

CONTENTS

I. REGULATION OF IP-ENABLED SERVICES SHOULD BE BASED ON THEIR FUNCTION, NOT THE TECHNOLOGY USED TO DELIVER THE SERVICE.

A. INTRODUCTION

The Notice asks whether the Commission should assert federal jurisdiction over the various categories of IP-Enabled services. In its *Pulver Declaratory Ruling*, the Commission determined that Pulver's "Free World Dialup" service is an "unregulated information service subject to federal jurisdiction."[2] The Notice asks whether the Commission should extend the findings in that ruling.[3] The Notice also observed that where the Act "does not prescribe a particular regulatory treatment, the Commission may have authority to impose requirements under Title I of the Act, specifically its 'ancillary' authority."[4]

The Notice asks whether the Commission should exercise its "ancillary authority" under Title I of the Act to apply requirements to information services.[5] The Notice also asks whether, and on what grounds, the Commission should preempt state regulatory jurisdiction over one or more classes of IP-Enabled service, and it recites numerous grounds for preemption.[6] Alternatively, the Notice observes that the Commission may forbear from applying specific provisions of Title II of the Act.[7]

---

[2] Par. 38.

[3] Par. 40.

[4] Par. 27, 42.

[5] Pars. 27, 42.

[6] These included: that federal regulation may "occupy the field;" that the matter may concern an inseparably mixed use where state regulation would negate valid Commission regulatory goals; that the Commerce Clause limits state regulation of IP-Enabled services; and that Section 253 of the Act prohibits states from prohibiting entry into telecommunications markets. Par. 41.

[7] Id.

B. REGULATION SHOULD AVOID CLASSIFICATIONS BASED ON PARTICULAR TECHNOLOGIES.

The broad issue in the Notice is whether the Commission should adopt special rules that apply solely to IP-Enabled services. It should not.

In various speeches, FCC Commissioners have criticized the tendency of the Congress in the past to create regulatory rules – sometimes called "stovepipes" or "silos" -- for particular technologies or industries. Although individual industries often prefer silo-based regulation, the Commission has justly criticized the method. The Commission here should resist the temptation to establish yet another "silo" for IP-Enabled services.

First, a new "silo" for IP services is likely to promote, rather than reduce, arbitrage. The more silos that exist, the greater is the opportunity for arbitrage. The providers of service will simply configure their service offerings to fall outside of the "silo" which is more pervasively regulated. With silo-based regulation, competitors expend their creative energies finding ways to recategorize their activities or to utilize the most legally favorable pathways, not in providing the best service at the lowest cost.

Silos based on a particular data format, like IP, are particularly pernicious because it is so easy to establish competition across the new regulatory boundary. Traditional silos were based upon independent transport technologies, and these facilities-based distinctions have merged slowly. IP-Enabled service, however, can use many of the same wires and fiber routes as existing switched services. Nor are they fundamentally different than other packet-based systems now in use within the switched network. Therefore, IP-Enabled service can quickly come into competition with other packet-based conventions, and the pernicious effects of arbitrage can develop even more rapidly than in the past.

Although competition can and does exist under silo-based regulation, customers are denied the efficiencies and savings of a truly competitive market, which includes competition across platforms. Instead they receive benefits created by arbitrage of the legal environment. The desired effect of competition, better services at lower prices, may not be achieved.

Termination of long-distance traffic offers an illustration of silo-based arbitrage that is already underway in this area. In the 1980's the Commission created the "enhanced services exemption" to encourage the development of innovative computer-based services. Today, "enhanced services" have become "information services" under the Act. Classically, a customer makes a local telephone call to an ISP in order to access the Internet. The ISP would then connect the customer to its own network or the Internet generally, and that might involve transporting information across state lines. Under the Commission's ESP/ISP exemption, the ISP need not pay interstate access charges for any portion of that call.

Six years ago, the Court of Appeals upheld the ISP exemption. Rereading the *Southwestern Bell* case [8] today, however, what is most striking is the narrow definition of ISP communications. It is clear from the opinion that the Court had in mind only the circumstance in which the ISP's customer *originates* a local call to contact the ISP, thereby reaching the Internet.[9] With that narrow definition in mind, the Court held that the ISP exemption did not discriminate against switched traffic. The court held in 1998

---

[8] *Southwestern Bell Tel. Co. v. Federal Communications Commission,* 153 F.3d 523 (8th Cir. 1998).

[9] *See, id., at 542,* footnote 9 ("ISPs subscribe to LEC facilities in order to receive local calls from customers who want to access the ISP's data, which may or may not be stored in computers outside the state in which the call was placed. An IXC, in contrast, uses the LEC facilities as an element in an end-to-end long-distance call that the IXC sells as its product to its own customers.")

that ISPs "do not utilize LEC services and facilities in the same way or for the same purposes as other customers who are assessed per-minute interstate access charges."[10]

Now, however, IP-Enabled communications are reportedly using the network in a new way that closely resembles toll termination. It appears that long range IP-Enabled communications providers are terminating voice traffic through local calls. Now, the ISP *originates* the local call, using this as a method of *terminating* a longer-range call. This is economically advantageous because most states have no per-minute charges for local calling, and IP-Enabled calls can be terminated without paying access or interconnection per-minute charges. This is a significant benefit to carriers who use this termination method, and it creates a significant regulatory advantage.

A second reason to resist creating a new "silo" for IP is that it undercuts the legitimacy of regulation. When the regulatory system makes important distinctions based on the provider's chosen technology, the credibility of that whole system is reduced. If the nature and extent of regulation depends upon the technology or facilities used by a provider, regulation in any particular area will tend to appear arbitrary because other areas are more heavily or more lightly regulated. Commonly, another provider will face less regulation, or regulation that is different in kind; any provider subject to the more stringent rules has a powerful argument that it is treated unfairly, particularly when there is actual competition across the categories. The results are a powerful drive to the lowest common regulatory denominator and increasing persuasiveness of the argument that the entire system of regulation is arbitrary and lacks valid underlying purposes.[11]

---

[10] *Id.* at 542.

[11] Perhaps it was for this reason that Congress chose to define "telecommunications service" in a way that explicitly precludes reference to the "facilities used." 47 U.S.C. § 153(46).

A third reason to avoid creating a new "silo" of IP-Enabled regulation is that it may not work. The Notice explains that one legal basis for a new silo would be "Title I" regulation. We explain below in more detail why this strategy places important consumer benefits at risk.

Fourth, a new "silo" for IP-Enabled communications could greatly complicate the existing dual system of regulation and leave the legacy telephone network with inadequate resources. At the very least, a separate federal jurisdiction over IP communications would vastly complicate jurisdictional cost separation. This is discussed in more detail below.

Rate-setting jurisdiction would also likely to become muddled, raising many new issues that could promote conflict between the Commission and the states. This, too, is discussed in more detail below. State commissions have ultimate responsibility for ensuring the viability of telephone service in rural areas. If the Commission does establish a "silo" for IP-Enabled services, the range of tools available to state commissions probably will be significantly constricted, and it may become increasingly difficult to ensure that service continues in high-cost rural areas, at affordable rates.

C. REGULATION SHOULD BE BASED ON FUNCTION.

Rather than adopt a "silo" approach, the Commission should try to maintain a functional approach to communications regulation. Regulation should not depend on the technology or equipment used, but instead should depend on the service or function provided to the customer, and the public interest underlying those services or functions.

For example, America's citizens deserve the right to send and receive information of their own design and choosing on facilities of all kinds. Customers are guaranteed this

right when they are served by a telecommunications common carrier, and the right should be equally secure when the customer chooses to use IP-Enabled services. The risk arises where a single entity can use its control of a customer's primary mode of access to information. The risk is exacerbated where that control is exercised to favor the political preferences of the controlling entity. This creates a significant risk to the most fundamental element of democracy itself, the free and open information in the marketplace of ideas. As we stated in comments two years ago regarding broadband wireline service, removing IP-Enabled services from Title II places this right at risk.[12]

A functional approach is also consistent with Chairman Powell's recently expressed vision of four telecommunications freedoms. At the NARUC Meeting that took place in Washington D.C. in March, Chairman Powell expressed the following four general principles to guide regulation.

- *Freedom to Access Content:* Consumers should have access to their choice of legal content.
- *Freedom to Use Applications*: Consumers should be able to run applications of their choice.
- *Freedom to Attach Personal Devices*: Consumers should be permitted to attach any devices they choose to the connection in their homes.
- *Freedom to Obtain Service Plan Information*: Consumers should receive meaningful information regarding their service plans.[13]

---

[12] The State of Vermont presented a similar argument to the Ninth Circuit. *Brand X Internet Services v. FCC*, Ninth Circuit Court of Appeals, No. 02-70518, Brief For Vermont Petitioner-Intervenors State Of Vermont, Vermont Public Service Board, And Department Of Public Service, filed Oct. 24, 2002.

[13] Powell, Michael, Speech to National Association of Regulatory Utility Commissioners, March 10, 2004, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-244737A1.pdf.

Notably, nothing in these principles refers to a specific technology, specific equipment or a specific mode of communication. Rather, the principles are functional, and apply, if at all, across all technologies.

The National Association of Regulatory Utility Commissioners has also noted the importance of a functional approach, in part because it is technologically neutral. Last November, NARUC recommended:

> in accordance with the principle of technological neutrality, regulatory jurisdiction should be based, whenever possible, on the characteristics of a service, not on the technology used to provide that service, whether the service is commingled with any other service or the speed or capacity of that service.

D. A LAYERED APPROACH TO REGULATION CAN BE CONSISTENT WITH FUNCTIONAL REGULATION.

The Notice asks whether the Commission should use a "layered" approach to regulation.[14] A layered approach would differentiate not among different platforms, but rather among various aspects of a particular offering - distinguishing, for example, among the regulation applied to (1) the underlying transmission facility, (2) the communications protocols used to transmit information over that facility, and (3) the applications used by the end user to issue and receive information.

Defining layers will help solve some of the problems of developing a functional approach to regulation. A layered approach is compatible with functional regulation, and it should be extended to other functionally similar services.

The Notice observes that IP-Enabled services riding numerous (primarily broadband) platforms appear to erode the links among the facility, the protocol, and the application more systematically than previous services. This is precisely the reason why

---

[14] Par. 37.

a functional approach is desirable. An IP-Enabled service provider with wires on a pole, for example, has a lot in common with a CLEC: it needs access to the pole at a reasonable price. The format of the electric impulses traveling over those wires is largely irrelevant.

Similarly, an IP-Enabled service provider, particularly one with bottleneck facilities, should refrain from interfering with the customer's control of content. Such interference can occur at the application or transport layer. The public's interest here is not fundamentally altered because the communications are in IP format.

II. THE COMMISSION SHOULD ACKNOWLEDGE THE NEED FOR CONTINUED GOVERNMENT REGULATION, INCLUDING STATE REGULATION, OF IP-ENABLED SERVICES.

IP-Enabled service providers have duties to their customers, to other carriers and the government. The Commission should refrain from actions that would inhibit its own ability, or the ability of the states, to enforce these duties.

A. IP-ENABLED SERVICES CUSTOMERS HAVE INTERESTS THAT SHOULD BE PROTECTED.

Consistent with Chairman Powell's four principles, the Commission should ensure that for IP-Enabled services:

- Customers have the right to control content.
- Customers have the right to select applications.
- Customers have the right to attach devices or their choosing, consistent with their service plan.

- Customers have the right to obtain meaningful information about their service plan.

While this is a good starting point, it is not a complete list. States have had a preeminent role in protecting consumers of telecommunications services from industry abuse. All of the interests protected by these regulations apply equally to IP-Enabled services.

1. Citizens' rights should be protected under generally applicable standards for communications providers[15] and from unjust discrimination by IP-Enabled service providers.
2. Citizens should be protected from unfair or deceptive practices.[16]
3. Citizens should receive accurate and complete advertising and information.[17]
4. Citizens should receive accurate and fair bills.[18]

---

[15] The Vermont Public Service Board has adopted the following consumer rights for telecommunications customers:

1. The right to know and control what one is buying.
2. The right to know from whom one is buying.
3. The right to know the full price of goods and services purchased.
4. The right to reasonable payment terms.
5. The right to fair treatment.
6. The right to impartial resolution of disputes.
7. The right to reasonable compensation for poor service quality.
8. The right of access to basic local exchange service, as long as basic local exchange service charges are paid, regardless of whether they have paid any charges for services other than basic local exchange services.
9. The right to be free of improper discrimination in prices, terms, conditions, or offers.
10. The right to privacy by controlling the release of information about oneself and one's calling patterns and by controlling u
11. The right to join with other consumers for mutual benefit.

[16] For example, providers should refrain from using a company name that is deceptive or unreasonably confusing to customers. In addition, providers should not use "negative enrollment" practices or otherwise "cram" services on customers who did not order them.

[17] For example, customers should receive written confirmation of service orders.

5. Citizens should receive information from providers concerning how to act on consumer complaints.

6. Citizens should not have their life or safety endangered by disconnections.[19]

7. Citizens should have their privacy protected. In particular:

   a. IP-Enabled service should refrain from improperly disseminating or otherwise misusing customer account information.

   b. IP-Enabled service providers should not provide email or other address information that others can use to generate unwanted commercial communications.

   c. IP-Enabled service should be required to refrain from communicating information that would substantially increase the danger to individuals under threat of harm, such as by disclosing location information about battered women shelters or the victims of domestic violence.

B. OTHER CARRIERS AND PROVIDERS HAVE INTERESTS THAT SHOULD BE PROTECTED.

IP-Enabled services should also be required to recognize duties to other communications providers and common carriers. At the most basic level, any IP-Enabled service provider with physical facilities should have a duty to physically interconnect, on request, with any other responsible communications provider. This basic principle was a

---

[18] For example, customers should receive accurate and understandable bills that do not contain hidden charges. Customers should not be subjected to rate increases without advance notice. Automatic debits of banks accounts should also be subject to reasonable limitations.

[19] Vermont currently prohibits disconnection of telephone service unless the carrier follows prescribed notice requirements. A utility's right to disconnect is suspended when the customer enters a payment plan or when the customer provides a physician's certificate that disconnection would threaten the customer's health or safety.

keystone in the early regulation of the telephone industry. For example, since 1880, Vermont statutes have required telephone and telegraph companies to interconnect with one another and pay compensation.[20] This old state statute is surprisingly similar to Section 201, which allows the Commission to order interconnection of communications carriers.[21] Similarly, Section 251(a) was created in 1996 to establish similar duties as between CLECs and ILECs.[22] The similarity suggests a deep underlying logic to government regulation of networked communications, from which IP-Enabled service are not exempt. The Commission should be extremely cautious in abandoning these enduring rules.

IP-Enabled service providers should also be required to carry the traffic (or packets) of other service providers without discrimination. As above, this basic principle has a long history in state regulation of the telephone industry.[23] Again, there is nothing

---

[20] *See* 30 V.S.A. § 2701, originally enacted in 1880 and last amended in 1961, currently states as follows:

§ 2701. Transfer of messages and interchange of service

Whenever the board, after a hearing had upon its own motion or upon complaint, finds that a physical connection can reasonably be made between the lines of two or more telephone companies or two or more telegraph companies whose lines can be made to form a continuous line of communication, by the construction and maintenance of suitable connections, for the transfer of messages or conversations, and that public convenience and necessity will be subserved thereby, or finds that two or more telegraph or telephone companies have failed to establish joint rates, tolls or charges for service by or over their lines, and that joint rates, tolls or charges ought to be established, the board may, by its order, (a) require that the connection be made, except where the purpose of the connection is primarily to secure the transmission of local messages or conversations between points within the same city or town, and that conversations be transmitted and messages transferred over the connection under such rules and regulations as the board may establish, and (b) may prescribe through lines and joint rates, tolls and charges to be made and to be used, observed and enforced in the future. If the telephone or telegraph companies do not agree upon the division of the joint rates, tolls or charges established by the board over the through lines, the board may, after further hearing, establish the division by supplemental order.

[21] 47 U.S.C. § 201(a).

[22] 47 U.S.C. § 251.

[23] *See* 30 V.S.A. § 2703, which provides:

§ 2703. Telephone service

so fundamentally different about IP-Enabled services that justifies an exception from this basic rule of inter-carrier fairness.

IP-Enabled service providerss also must comply with safety codes. When an IP-Enabled provider puts equipment on common poles or in common conduits, the equipment must be safe, and it must be installed in a way that protects the workers of other utilities. Because states have been preeminent in adopting and enforcing electrical safety codes, federal preemption in this area would be particularly inappropriate.

As is generally true under American law, IP-Enabled services also must deal honestly with other carriers. If compensation due to or from other carriers depends upon the volume of traffic, IP-Enabled services must accurately track that traffic, and honestly report the results. Because communications duties have generally been enforced by regulatory agencies in the United States, either the Commission or state commissions should continue to be able to enforce these standards of honest dealing.

IP-Enabled services also must observe some minimum protocols for interfacing with the switched network.

- When an IP-Enabled service seeks to terminate voice traffic on switched network or on facilities owned by a local exchange carrier, some form of traffic measurement may be required if compensation is based on usage.

On application of a telegraph or telephone company and upon reasonable terms, a person or corporation owning, controlling or operating a telephone exchange or service in this state shall furnish such applicant with the use of a telephone or telephones, and telephonic service and connection with the respective exchanges and the subscribers thereto, without discriminating between telegraph or telephone companies as to the connection, service or use of instruments furnished or charges made.

- IP-Enabled services may be required to follow particular conventions when submitting routing data to be included in the Local Exchange Routing Guide.
- IP-Enabled services may be required to follow particular conventions regarding NANC telephone numbers when accepting, holding or issuing those numbers to customers.

C. THE PUBLIC HAS INTERESTS THAT SHOULD BE PROTECTED.

IP-Enabled services should be required to recognize duties to the people generally, as represented by their governments.

States and localities need to be able to operate comprehensive 911 and E-911 programs. Vermont has had a statewide Enhanced 911 program since 1995, and it spends approximately $3.3 million per year of state funds to operate this program. Availability of this system is enhanced by the Vermont Public Service Board's rule requiring all telephone companies to provide "continuous emergency access" on disconnected telephones. IP-Enabled services should not punch a hole in Vermont's carefully constructed – and expensively maintained – safety net for its citizens.

IP-Enabled service providers must also provide reasonable assistance to law enforcement. To the extent that an IP-Enabled service provider offers dial-tone service to a customer in Vermont, that provider should be willing to provide reasonable assistance to Vermont law enforcement personnel. The provider should have a presence in Vermont sufficient to ensure that law enforcement requirements can be satisfied simply and directly.

IP-Enabled services should also contribute to the support of universal service. Like other communications services, IP-Enabled services derive their value from access to a ubiquitous network. It is reasonable to require contribution equally from IP-Enabled services and other communications services for this purpose.

Finally, IP-Enabled service providers should be required to conserve scarce telephone numbers. Absent some external restraints, IP-Enabled service providers could lead to premature exhaustion of area codes.

D. IP-ENABLED SERVICES SHOULD NOT BE ALLOWED TO EXERCISE MARKET POWER.

NARUC recently adopted principles that provide guidance on which network layers and functions should be subjected to economic regulation. Market-based rates should be used where the market is determined to be competitive. Conversely, non-competitive markets do need price regulation, and government should limit the ability of carriers with market power to impose excessive charges.[24]

These principles obviously apply to retail services, but they apply with equal or greater force to wholesale services. Just like an ILEC, an IP-Enabled service provider that holds a bottleneck position in the communications network should not be permitted to impose excessive charges.

Economic regulation of IP-Enabled services may seem remote given the industry's current level of development. But fundamental changes could occur quickly. In the future, remote customers may be as dependent on their IP-Enabled broadband facilities as today's customers are dependent on switched loops. In each case the last

[24] A rigorous definition of "competitive market" is needed in order to prevent abuses, and competitive markets can become non-competitive, requiring the re-imposition of regulation.

mile remains a bottleneck for access to the retail customer. Without government intervention, this can lead to excessive wholesale charges for "terminating" traffic as well as excessive rates retail charges.

III. "TITLE I" REGULATION IS UNLIKELY TO BE A SUFFICIENT LEGAL BASIS FOR PROPER REGULATION OF IP-ENABLED SERVICES.

The Commission may not classify a service as an information service if it includes paid, generally available, transport of information from one third party to another. Title I regulation is not demonstrably sufficient to protect the public. Declaring IP-Enabled service to be an information service will complicate separations and universal service, and should be referred. Declaring IP-Enabled service to be an information service is likely to weaken states' abilities to protect their citizens.

A. A SERVICE IS MORE THAN AN "INFORMATION SERVICE" IF IT INCLUDES PAID DATA TRANSPORT BETWEEN THIRD PARTIES.

IP-Enabled services allow the end-user to send and receive information of the user's choosing, without change in its form or content. Accordingly, an end-user customer can use the IP-Enabled service to transport data to and from another user. This squarely meets the statutory definition of "telecommunications" in the Act.[25]

When the Act passed in February of 1996, the Commission-established concept of "enhanced services" was limited. It comprehended "dial-up" services, like Lexis, Westlaw and America Online, that allowed customers to dial a number (usually a local call) and gain access to news and other information. It did not include services by which a provider transports data from one place to another, from one third-party to another.

---

[25] *See* 47 U.S.C. § 153(43).

This narrow conception is consistent with the Act's actual definition of information services. That definition includes:

> offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing.[26]

Nothing here makes reference to paid transport of data from point to point from and to third parties.

Other examples are available from the Act showing incompatibility between information services and paid third-party transport. For example, in Section 230, Congress defined "interactive computer service" as:

> any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.[27]

Here, an information service is but one of several species of "interactive computer service." Interactive computer services generally do not include transport from one third party to another, and neither, it seems, do information services.

Also, in Section 228, "information service" is used in a section defining common carrier obligations with regard to "pay-per-call" services. In this context, "information service" clearly means only audio services,[28] and cannot conceivably include third-party transport.

Congress' limited conception of "information services" is also apparent from contemporaneous judicial decisions. In 1998, in its 1998 *Southwestern Bell* decision, the

---

[26] 47 U.S.C. § 153(20).

[27] 47 U.S.C. § 230(f)(2).

[28] *See,* 47 U.S.C. § 228(c)(7)(D), 228(c)(8)(B).

Eighth Circuit described a narrow definition of information services.[29] It seems that information services in 1996 did indeed transport data, but they did so internally, from their own central computers to points of presence where they made their information available to the public.

Nor have the courts since then allowed the Commission to overlook the transport component. In 2000, the Ninth Circuit Court of Appeals reviewed the status of "@Home," a cable modem service offered by AT&T. The court stated in *Portland v. AT&T* that the service contained "two elements: a "pipeline" (cable broadband instead of telephone lines), and the Internet service transmitted through that pipeline." The court found that @Home controlled all of the transmission facilities between its subscribers and the Internet and, "to the extent that @Home provides its subscribers Internet transmission over its cable broadband facility, it is providing a telecommunications service as defined in the Communications Act."[30] The Ninth Circuit upheld its *Portland* ruling in 2003.[31]

These court decisions cast grave doubt on the wisdom of the strategic direction suggested by the Notice. If the Commission decides to undertake defining IP-Enabled service as an "information service," and excluding it from Title II regulation, years of uncertainty and litigation seem likely to follow.

---

[29] *Southwestern Bell Tel. Co. v. Federal Communications Commission,* 153 F.3d 523, 542, note 9 (8th Cir. 1998).

[30] *AT&T Corp. v. City of Portland*, 216 F. 3d 871, 878 (9th Cir. 2000).

[31] *Brand X Internet Services v. Federal Communications Commission,* ___ F.3d ____ (9th Cir. 2003).

B. TITLE I REGULATION IS NOT DEMONSTRABLY SUFFICIENT TO PROTECT THE PUBLIC.

Even assuming, *arguendo,* that the commission is successful in defining IP-Enabled service as solely an "information service" regulated under Title I, there is a second problem. Title I seems highly unlikely to support all the regulatory requirements needed to protect the public. Where Congress did explicitly regulate information services, it did so narrowly. What the Notice proposes amounts to a wholesale importation of major sections from Title II into Title I, all without any explicit statutory authorization.

1. Explicit Regulation of Information Services Is Narrowly Limited In the Act.

The Notice asserts that Title I jurisdiction is based in part on statute, which "codified, with minor modifications, the Commission's pre-1996 distinction between regulated "basic" and largely unregulated "enhanced" services." The Notice also admits, however, that the Act did not "establish any particular entitlements or requirements with regard to providers of information services."[32] This is an understatement.

While the Act does indeed define "information services,"[33] the Commission's authority over those information services is far from clear. Nowhere does the Act explicitly say that the Commission has broad authority, much less sweeping so-called "Title I" authority over such services.

Title I "ancillary jurisdiction" itself has only the slimmest statutory anchor. It is based on the following broad provision:

---

[32] Par. 27.

[33] 47 U.S.C. § 153(20).

> [t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."[34]

The Notice essentially proposes that these 32 words will allow the Commission to impose most or all of Title II regulation upon IP-Enabled service, but without detailed statutory guidance.

2. Major benefits of Title II are at risk.

We observed above that IP-Enabled services have numerous duties to customers, to carriers, and to the public, and that IP-Enabled services should not be allowed to exercise market power. At best, it seems likely that a decision to expand information services would also create legal uncertainty, possibly for a period of years; and that might reduce future investment in such broadband and VOIP services.

It seems highly unlikely that, despite its best wishes, that the Commission will succeed, under Title I, in replicating all the important regulatory requirements that are set out explicitly in Title II. The following Title II protections will need to be considered, and may be beyond the reach of Title I:

- Must an IP-Enabled service provider allow its customers sole control over content?
- Must an IP-Enabled service provider offer service at just and reasonable rates, to all those who reasonably request them, on a non-discriminatory basis, subject to reasonable billing and termination practices and specific service quality standards?[35]

---

[34] 47 U.S.C. § 154(i).

[35] *See* 47 U.S.C. §§ 201, 202.

- May the Commission adjudge the lawfulness of proposed charges, classifications, regulations, and practices, and if it finds them unlawful, to prescribe just and reasonable ones?[36]
- Must an IP-Enabled service provider seek approval for discontinuance of service?[37]
- Must an IP-Enabled service provider protect customer information?[38]
- Can customers using IP-Enabled service services be prosecuted for obscene or harassing calls?[39]
- Can an IP-Enabled service provider gain attachment to a pole or use a right-of-way? If it has poles, must it provide attachments to others?[40]
- Must an IP-Enabled service provider provide services for the hearing impaired or with disabilities?[41]
- Can an IP-Enabled service provider be prevented from auto-dialing prerecorded messages?[42]
- Can an IP-Enabled service provider be required to protect customers from abuses by pay-per-call services? Can an IP-Enabled service provider be required to block certain area codes on request?[43]

---

[36] *See* 47 U.S.C. § 204, 205.

[37] *See* 47 U.S.C. § 214.

[38] *See* 47 U.S.C. § 222.

[39] *See* 47 U.S.C. § 223.

[40] *See* 47 U.S.C. §§ 224, 251(b)(4).

[41] *See* 47 U.S.C. §§ 225, 255.

[42] *See* 47 U.S.C. § 227.

[43] *See* 47 U.S.C. § 228.

- Can an IP-Enabled service provider be required to participate in CALEA? If not, there could be threats to public safety and national security.[44]
- Can an IP-Enabled service provider be required to interconnect with other carriers?[45]
- Can an IP-Enabled service provider be required to comply with common network functions relating to access by persons with disabilities and more generally regarding public telecommunications network interconnectivity?[46]
- Can an IP-Enabled service provider receive blocks of unused telephone numbers? If so, can the FCC ensure that the numbers are used appropriately? Can the FCC require the numbers be made portable?[47]

C. DECLARING IP-ENABLED SERVICES TO BE AN INFORMATION SERVICE WILL COMPLICATE SEPARATIONS AND UNIVERSAL SERVICE, AND SHOULD BE REFERRED.

If IP-Enabled communications are regulated under Title I as an information service, this could greatly complicate the existing dual system of regulation by federal and state jurisdictions, and particularly cost separations and universal service.

At present, most switched communications are identifiable based on the locations (origination and termination) of the "end user." Creating special rules for IP-Enabled communications could, however, alter this fundamental fact. If, as the Notice suggests, the Commission preempts state activity over IP-Enabled communications, a substantial

---

[44] *See* 47 U.S.C. § 229. CALEA has separate statutory definitions.

[45] *See* 47 U.S.C. § 251(a).

[46] *See* 47 U.S.C. §§ 251(b), 255, 256.

[47] *See* 47 U.S.C. § 251(b)(2).

portion of what the switched network now identifies as intrastate traffic would fall under federal jurisdiction. The traffic would appear to be intrastate, but would in fact be interstate. Even recognizing that separations factors are currently frozen, this kind of jurisdictional change argues for an immediate reallocation of costs between the jurisdictions.

The separations freeze expires in 2006, and this intensifies the problem. Unless some new system and currently undefined system replaces the freeze in 2006, carriers will resume measuring traffic in 2005. But jurisdictionally accurate traffic measurement may be impossible, because an unidentifiable portion of what appears to be intrastate traffic (usually local traffic) would actually be part of a longer-range IP-Enabled communication. For these reasons, if the Commission wishes to declare IP-Enabled service to be an information service, it must first refer the separations implications to the Joint Board on Separations.[48]

Declaring IP-Enabled services to be information services could also affect the practical ability of states to support high-cost areas. A declaration that IP-Enabled services are not telecommunications service might reduce revenues to state universal service collection mechanisms. Under Section 254(f), states have a right to collect charges only from a "telecommunications carrier that provides intrastate telecommunications services."[49] For these reasons, if the Commission wishes to declare IP-Enabled service to be an information service, it should first refer the separations implications to the Joint Board on Universal Service.[50]

---

[48] 47 U.S.C. § 410(c).

[49] 47 U.S.C. § 254(f).

[50] 47 U.S.C. § 254(a).

Finally, if the Commission does preempt state regulation and also holds that IP-Enabled service is an information service, the Commission should understand that it will be opening up a large question as to what operations of incumbent LECs should be considered as "below the line" for state ratemaking purposes. If states cannot regulate IP-Enabled service, and if that service is not even a telecommunications service, those states may well decide that carriers cannot include associated plant and expenses in their submissions for purposes of setting rates for regulated services. The Commission should be cautious not to interfere with residual state ratemaking authority. Specifically, the Commission should declare that nothing prevents the states from placing the rate base and expenses associated with IP-Enabled services of regulated companies "below the line" for purposes of calculating rates for intrastate telecommunications services.

D. DECLARING IP-ENABLED SERVICES TO BE AN INFORMATION SERVICE IS LIKELY TO WEAKEN STATES' ABILITIES TO PROTECT THEIR CITIZENS.

A declaration that IP-Enabled services are information services is likely to significantly weaken state protection of their citizens' rights, even if the Commission does not also preempt state regulation. If IP-Enabled service is not a telecommunications service, it is difficult to see how states could require IP-Enabled service providers to pay access or reciprocal compensation charges. This could reduce the ability of state commissions to continue to provide rural areas with local exchange service at reasonable rates.

Several states and counties have comprehensive 911 or E-911 programs. If the Commission removes IP-Enabled service from "telecommunications," this could prevent

states from requiring IP-Enabled service providers to participate effectively in 911 and E-911 programs. They could be expected to argue that they will be exempt from such regulations, which were designed for telecommunications carriers.

IV. PREEMPTION OF STATE REGULATION IS NOT JUSTIFIED.

The Notice proposes that states would be preempted from regulating IP-Enabled services. The Commission's analysis is flawed, both in reading the statutory language too broadly, and in applying its conclusion to services that include transport. Preemption would be subject to a legal challenge. While the Commission's authority to preempt was being decided, the services in question would remain in legal limbo, and that could impair investment in the telecommunications sector.

A. STATE REGULATION IS NOT INHERENTLY HARMFUL.

The Notice notes, apparently with alarm, that some states have "begun to diverge in their approaches to the regulation of VOIP services."[51] The Notice suggests that diverging state regulation of IP-Enabled service would be harmful to the industry, and that the Commission needs to preempt state regulation in order to protect the industry and the innovation that has been its hallmark.

Not all forms of state regulation would impose harm on IP-Enabled services. State regulation may in fact impose only minimal burdens on IP-Enabled service, burdens that are commensurate with other providers who provide functionally similar services. Moreover, divergent approaches are not only allowed under the Constitution, but are often recognized as the preferred way of developing the best new policies.

---

[51] Par. 34.

The recent decision of the New York State Department of Public Service regarding Vonage Holdings Corporation (Vonage) provides a good example of responsible and apparently harmless regulation. On May 19, 2004, the New York Department of Public Service ordered Vonage to obtain a Certificate of Public Convenience and Necessity as a telephone corporation. It held that Vonage provides a service that enables subscribers to complete telephone- like calls to other subscribers over the Internet and to subscribers of local telephone companies using landline networks.

Nothing in the New York decision suggests that it is likely to impose unreasonable requirements on Vonage. To the contrary, New York appears to have moved cautiously. In its decision, New York emphasized its keen interest in applying only minimal regulations to ensure that it does not interfere with the rapid, widespread deployment of new technologies. New York even delayed enforcement to allow Vonage to file for any necessary waivers.

At the same time, the New York commission noted that its core public interest concerns, including public safety and network reliablity, must still be met. Thus it applied the "same limited regulatory regime which is applied to comparable competitive carriers in New York." This means that Vonage will not be subject to economic or rate regulation, but it must obtain authorization to provide telephone service and file a schedule of its rates.

New York appears to have taken full account of the benefits of the emerging VoIP technology, while minimizing the risks that an unregulated telecommunications provider poses the public interest, safety and economy. Moreover, New York appears to have

avoided creating new competitive inequalities. By avoiding a new regulatory "silo" for IP-Enabled service, all functionally similar providers face similar regulation.

The Vermont Public Service Board has not heard any evidence in our own state on similar issues. Yet we see nothing at the moment in this report of the New York decision that would appear to harm the development of responsible IP-Enabled services.

B. THE COMMISSION HAS NO AUTHORITY TO PREEMPT STATE REGULATION OF AN INFORMATION SERVICE.

The Notice proposes to preempt states from regulating what the Notice also would characterize as an "information service." It does this by characterizing the information service as "interstate." This is an oxymoron.

The Act establishes a dual federal-state regulatory scheme for *communications*. Under Title I, the Act authorizes the FCC to regulate all "interstate and foreign communication by wire or radio."[52] "Communication by wire" is the "transmission . . .by aid of wire, cable, or other like connection between the points of origin and reception of such transmission" and is provided by common carriers.[53] Exactly the same phrase is used in Title II, which is devoted to the duties of common carriers.[54] Information services, by contrast, are defined as a "capability," not a communication.[55] Thus, in proposing that IP-Enabled service be an information service, the Notice would conclude that IP-Enabled service is not an "interstate or foreign communication by wire or radio" for purposes of Title II of the Communications Act.

---

[52] *See* 47 U.S.C. §§ 152(a), 153(22).

[53] *See* 47 U.S.C. §§ 153(52), 153(10).

[54] *See* 47 U.S.C. §§ 201, 203.

[55] *See* 47 U.S.C. § 153 (20).

The statutory words "interstate or foreign communication by wire or radio" carry the same meaning in Title I and in Title II of the Act. Where statutory terms are clear, the Commission should apply the plain meaning and should not add additional words. The Notice apparently proposes that IP-Enabled service is sufficiently "communication' to preempt state law, but insufficiently "communication" to be regulated under Title II. The two concepts simply cannot stand together.

The Commission may preempt state and local regulation only where it has authority. If IP-Enabled service is an information service – and is not a communication regulated under Title II – there is no legal basis to declare that service to be "interstate" or to preempt state law.

C. THE ACT DOES NOT SUGGEST OR REQUIRE PREEMPTION OF IP-ENABLED SERVICES.

The Notice recites that federal authority is preeminent in the area of information services, and "particularly in the area of the Internet and other interactive computer services," which Congress has explicitly stated should remain "unfettered" by federal or state regulation.[56] The Notice relies on Section 230 as the key citation for this proposition.

Section 230 does not mandate any such result. First, the argument is illogical. Even if Section 230 did mandate such a policy, it would mandate a "hands-off" policy for both federal and state regulators. Nothing in Section 230 suggests that the Commission also has an independent duty to establish a prophylactic preemption, anticipating a state violation.

---

[56] Par. 39.

The Notice proposes to place too much weight on Section 230. This special-purpose section has a narrow scope, too narrow to support a global policy of nonregulation of the Internet. Section 230 concerns itself with protecting the private blocking and screening of offensive material. It has two operative provisions. First, it creates "good samaritan" protection for people who in good faith block or screen offensive material. Second, it imposes a new obligation on ISPs to disclose to customers the availability of parental control protections.[57]

For such a narrow context, Congress included unusually detailed findings and policy statements. As the Notice observes, one of those policies was indeed to preserve "the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[58]

The subsequent three policies in that subsection, however, immediately establish exceptions: to encourage particular technologies; to remove disincentives for blocking software; and to ensure enforcement of criminal laws against certain Internet uses.[59] Viewed in its entirety, the policy subsection in 230 shows not that the Internet will be free from regulation, but the contrary. It shows that limited regulations will indeed be imposed on the Internet.

In summary, Section 230 has a limited purpose that cannot support a global conclusion about regulation or deregulation. Second, read in its entirety, it expresses a policy that the Inernet will indeed be regulated, even if reluctantly. Section 230 cannot

---

[57] *See* 47 U.S.C. § 230(d).

[58] 47 U.S.C. § 230(d)(2).

[59] 47 U.S.C. §§ 230(d)(3)-(5).

provide support for a policy of compulsory preemptive deregulation of IP-Enabled services.

The Notice also cites Section 706 of the Act to establish that the Internet should remain "unfettered" by federal or state regulation.[60] This citation is even more flawed. Section 706 encourages deployment of "advanced telecommunications capability" by using measures that "promote competition in the local telecommunications market." Nothing here even remotely suggests that the Commission should classify IP-Enabled services as "information services" or should preempt state regulation of these communications. Yes, Congress wanted additional deployment of advanced services, but it provided in detail within section 706 how that was to be achieved. Nothing in Section 706 says that the Commission should preempt state regulation of IP-Enabled service.

D. PREEMPTING STATE AUTHORITY OVER IP-ENABLED SERVICE WILL DEPRIVE VERMONT OF AUTHORITY TO PROTECT THE LEGITIMATE INTERESTS OF ITS CITIZENS.

Preempting state authority will leave Vermont and other states without sufficient authority to protect the interests of their citizens. We listed above several classes of duties for IP-Enabled service providers: duties to other customers; duties to other carriers; and duties to the public. Many of these duties will be compromised if IP-Enabled services are declared to be federally preempted.

1. Consumer Interests

We described above numerous consumer protections that the Vermont Public Service Board currently imposes on telecommunications carriers. If IP-Enabled service

---

[60] *See* 47 U.S.C. § 157 note.

is preempted, many of these protections will be impossible to sustain. We provide here merely two examples.

We recommended above that states should continue to be able to ensure the accuracy and completeness of advertising and information provided to customers and potential customers. For example, carriers should be required to provide customers with written confirmations of service orders. If IP-Enabled service is preemptively federal, the Vermont Public Service Board may no longer be able to assure customers that this basic practice will be followed by all telephone service providers.

We also recommended above that states should continue to be able to protect the privacy of their citizens. For example, the Vermont Public Service Board requires local exchange carriers to block the ANI codes of certain callers. The purpose is to protect individuals with a strong but legitimate interest in anonymity, such as victims of domestic violence and organizations that provide refuge to such victims. If IP-Enabled service is preemptively federal, the Vermont Public Service Board may no longer be able to assure customers that this important protection will be observed.

2. Carrier-To-Carrier Interests

We recommended above that IP-Enabled service providers be required to carry the traffic (or packets) of other service providers without discrimination and that they also be required to comply with safety codes. We also recommended that IP-Enabled service providers be required to report honestly to other carriers regarding traffic volumes, if commercially relevant. If IP-Enabled service is preemptively federal, the Vermont Public Service Board may no longer be able to ensure that these practices are followed by IP-Enabled service providers.

3. Public Interests

We recommended above that IP-Enabled service providers be required to participate in Enhanced 911 programs, and we described the unusual funding and policies adopted in Vermont to ensure an effective and ubiquitous emergency response system. If IP-Enabled service regulation is preemptively federal, Vermont may no longer be able to ensure that Vermont's E-911 program is available throughout the state, and the substantial benefits of a statewide universal system could be lost.

Vermont also has an interest in conserving its existing "802" area code from needless exhaust. Some VOIP providers today are using telephone numbering resources, but they have not obtained certificates to operate as telecommunications service providers. State authority over such number usage might be reduced or eliminated. If IP-Enabled services continue to expand at their present rate, this could lead to premature exhaustion of Vermont's area code.

4. Rate Regulation

We noted above that in non-competitive markets, government should limit the ability of carriers with market power to impose excessive charges, and that these limitations should apply to both retail and wholesale services. If IP-Enabled service is preemptively federal, the Vermont Public Service Board may no longer be able to assure retail customers or other carriers that rates imposed by IP-Enabled service providers are just and reasonable.

So long as IP-Enabled service providers do not have market power, the discipline of a competitive market should prevent any real problems from arising. However, there is nothing about IP-Enabled service that makes it incompatible with an IP-Enabled

service provider acquiring bottleneck facilities and exercising market power. When that combination arises, rate regulation will likely be needed to protect both wholesale and retail purchasers.

IP-Enabled services are intermingled with switched services, and in many cases appear simply as local switched calls. For this reason, preemption of state authority over IP-Enabled service will likely lead to many difficult issues for states, and many new conflicts with the Commission.

For example, Vermont recovers a substantial portion of local exchange costs by imposing "local measured service" charges. These are per-minute charges imposed on customers who originate local traffic. If the Commission does preempt state regulation and also holds that IP-Enabled service is an information service, it isn't clear how that preemption would apply to local calls that form a portion of a longer-range IP-Enabled service. Providers might argue that states are without authority to impose per-minute local measured service requirements on them or their customers, even when those communications appear, within the switched world, to be nothing more than independently made local calls.

Similarly, the Vermont Public Service Board might at some time make a finding that ISPs impose different costs than do other business customers. If so, it might be appropriate to divide ISPs from other business customers and establish two new sub-classes of retail customer. However, if ISPs only provide IP-Enabled services, and if those services have been preempted as information services, a provider might well question whether Vermont has any authority to require the filing of tariffs. Thus if the

Commission acts as the Notice suggests, it may be moving "local calling" by an entire class of local exchange customer beyond the authority of state commissions.

V. THE COMMISSION SHOULD KEEP A BROAD DEFINITION OF "TELECOMMUNICATIONS SERVICE," AND FORBEAR AS NEEDED.

A. THE COMMISSION SHOULD ADOPT A BROAD DEFINITION.

We described above some of the many conundrums that are likely to arise if the Commission declares IP-Enabled service to be an interstate information service. The root problem is creating a particular "silo" of protection by declaring something that is communication to be something other than communication. To the contrary, the Commission should declare that an IP-Enabled service that include a paid transport component between third parties is a "telecommunications service," subject to Title II, that is regulated as common carriage.

This will automatically avoid dozens of thorny issues about whether Title I is sufficient to protect customers, other carriers, and the public. Title II clearly is sufficient to this purpose.

B. THE COMMISSION SHOULD FORBEAR AS NEEDED.

A broad definition does not mean that the Commission cannot "regulate lightly." In the 1996 Act, Congress gave the Commission a tool to use when it wanted to do this. Section 10 of the Act[61] provides that the Commission may forbear from applying any regulation, or even a provision of the Act itself for a class of telecommunications carriers. The only requirements are that the Commission must first determine that, after it

[61] *See* 47 U.S.C. § 160.

forbears, charges will remain just and reasonable and not discriminatory, consumers will still be protected, and the public interest will be served.

These are all reasonable requirements, and it seems quite likely that the Commission could make such findings as it matches its current regulations against the characteristics of the IP-Enabled service markets. For example, the Commission should consider forbearance from any registration requirements, quality of service requirements and economic regulation regarding the Internet backbone.

The Commission has also expressed concern about the possibility of states interfering with IP-Enabled service providers. Once again the Act provides a suitable tool. The Commission has authority under the Act to bar a state from imposing a requirement that imposes a barrier to entry.[62]

VI. LEGISLATION IS NEEDED.

Developing a functional approach to regulation will be extremely difficult under existing law. The basic elements of that law were enacted 70 years ago, and have little to do with today's networks. The statute has embedded within its basic structures such concepts as the distinction between local and toll calling, and the distinction between intrastate and interstate calling. These concepts have become more arcane in the last 20 years, and the advent of IP-Enabled services show that they are no longer sustainable.

We agree with the Commission's preliminary finding that VOIP services are changing and evolving so rapidly that they are not well suited to the model of regulation which has been traditionally applied to circuit switched telephone services. However, that statement applies equally to many non-VOIP based advanced services.

---

[62] *See* 47 U.S.C. § 253(a).

The Commission is not free under Title I to construct the equivalent of an imaginary new Act for itself. Congress needs to be involved, if only to remove obsolete concepts that no longer serve a purpose and that continually confound efforts to adapt regulation to modern markets and technologies. The Vermont Public Service Board would be pleased to work cooperatively with the Commission and other states to develop new legislation that addresses the new technology.

Respectfully submitted,

Peter Bluhm, Esq.
112 State Street, Drawer 20
Montpelier, Vermont 05620-2701
For the Vermont Public Service Board

Dated: May 28, 2004